The Destruction of Subpoenaed Corporate Records

Michael D. Risley
University of Kentucky

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COMMENTS

The Destruction of Subpoenaed Corporate Records

INTRODUCTION

Federal courts have increasingly been faced with issues surrounding the prosecution of persons for the destruction of corporate records which have been subpoenaed by federal grand juries. In United States v. Faudman, the Sixth Circuit Court of Appeals dealt with the prosecution of a defendant who, with the knowledge that a federal grand jury had issued a subpoena duces tecum for certain documents of a company he had spent his life building, altered and destroyed some of those records before they were turned over to the grand jury. The defendant in Faudman was charged with obstruction of justice under Title 18, section 1503 of the United States Code. The sole significant issue

1 See, e.g., United States v. Rasheed, 663 F.2d 843 (9th Cir. 1981); United States v. Faudman, 640 F.2d 20 (6th Cir. 1981); United States v. Walasek, 527 F.2d 676 (3d Cir. 1975).
2 640 F.2d 20 (6th Cir. 1981).
3 "A subpoena duces tecum is an order to produce documents or show cause why they need not be produced." Nixon v. Sirica, 487 F.2d 700, 709-10 (D.C. Cir. 1973). In Faudman, the subpoena duces tecum ordered the production of corporate records of the company for which Faudman worked. The cases in which the destruction of documents constitutes an obstruction of justice all deal with subpoenas duces tecum for corporate records.
4 640 F.2d at 21.
5 This comment will deal with the alteration of documents and the destruction of documents without distinguishing between the two types of behavior. An argument could be made that altering documents is worse than destroying them for alteration involves, in effect, destroying the documents as they exist and the creation of a different set of documents. However, since either act is an attempt to keep the true records from being turned over to the investigating body, many of the cases in this area make no distinction in their discussion. See, e.g., id. There is nothing in the obstruction of justice statutes on which to make any meaningful distinction between altering and destroying documents; clearly, if what is prohibited by the statute involved includes either type of behavior, the other is likewise prohibited. See United States v. Cohen, 202 F. Supp. 587, 589 (D. Conn. 1962).
   Whoever corruptly, or by threats of force, or any threatening letter or
before the court in Faudman was whether that statute could serve as a basis of a prosecution for the destruction or alteration of documents sought by a grand jury.

At the time the Sixth Circuit decided Faudman, the law was unsettled as to whether the applicable statute did in fact prohibit such behavior. Although there were cases from both the Sixth Circuit and other jurisdictions which generally called for a narrow reading of the portion of section 1503 upon which the prosecution was based, very few reported cases dealt with section 1503 and the destruction of documents. Faced with this background, the Sixth Circuit held Faudman's behavior to be in violation of section 1503.7

This Comment will focus on whether the prosecution of one communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any other such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Id. (emphasis added). It is the final, omnibus clause under which the defendant in Faudman was prosecuted.


7 United States v. Faudman, 640 F.2d at 23.
who destroys corporate records, having knowledge that they are being sought by a federal grand jury, is properly based upon the omnibus clause of section 1503. In so doing, the history of the statute will be outlined and its interpretation and construction in other fact patterns will be discussed. The cases which have dealt with section 1503 and the alteration or destruction of documents will be reviewed. It will be contended that, based on the broad purpose behind section 1503 and the degree of culpable intent involved in the destruction of documents with knowledge that they are relevant to a grand jury investigation, the Sixth Circuit was correct in affirming Faudman's conviction. Finally, there will be a discussion dealing with whether the broad reading given section 1503 in Faudman and similar cases renders it unconstitutionally vague. This Comment will strongly argue that persons who would destroy documents relevant to a grand jury proceeding have such a culpable intent that they have fair notice that their behavior is not lawful and that therefore the statute is not unconstitutionally vague.

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8 This comment will not deal with the issue faced by some courts as to when a grand jury proceeding is "pending" so that it may be said that justice is being administered. The problem arises in this area because documents may be destroyed even prior to a subpoena being issued. See United States v. Solow, 138 F. Supp. 812 (S.D.N.Y. 1956). Courts have consistently rejected the contention that a subpoena would have to be issued or the grand jury must hear actual testimony before the grand jury investigation may be considered pending. See United States v. Walasek, 527 F.2d at 678; 138 F. Supp. at 816. The court in Walasek, however, did recognize that a grand jury subpoena may become the instrumentality of some investigating body without judicial supervision, implying that, in such a situation, there would not be an administration of justice. Id. See also United States v. Ryan, 455 F.2d 728, 733 (9th Cir. 1972). Even if the administration of justice has not begun, if more than one person is involved in destroying documents, a prosecution for conspiring to obstruct justice may be appropriate. Cf. United States v. Shoup, 608 F.2d 950 (3d Cir. 1979) (conspiracy to obstruct justice by expressing an opinion about the causes of voting machine breakdowns less forcefully than he initially intended in order to benefit a fellow conspirator).

Another issue this comment will not discuss is what is to be considered "material" to a grand jury proceeding. The question is very fact-specific; the general rule is that something is relevant and material to a grand jury investigation when it will shed light on the matter on which the grand jury is deliberating. See Foster v. United States, 265 F.2d 183 (2d Cir.), cert. denied, 360 U.S. 912 (1959).

For a more complete discussion of these and other issues under § 1503, see Annot., 20 A.L.R. Fed. 731 (1981).
I. 18 U.S.C. SECTION 1503: ITS HISTORY,9 PURPOSE AND CONSTRUCTION

The current contempt statute, section 1503, has appeared in the federal statutes in some form since the Act of March 2, 1831,10 an act to be "declaratory of the law concerning contemps of court."11 The power of federal courts to deal with contemptuous conduct had been recognized since the Judiciary Act of 1789.12 The 1831 Act consisted of two sections; the first dealt with misbehavior occurring in the presence of the court, while the second section was directed at behavior away from court. Along with the difference in the sections based on the contemtor's proximity to the court, an important procedural difference existed: while contempt under the first section could be punished summarily,13 acts which violated the second section had to be dealt with through the indictment process.14 The first section of the 1831 Act has evolved into what is now the statute providing a court with power to deal with contempt.15 The second section of the 1831 Act is now part of the obstruction of justice statute under which the defendant in Faudman was prosecuted.16

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9 For cases which discuss the evolution of what is now § 1503, see United States v. Griffin, 589 F.2d 200, 204-06 (5th Cir. 1979); United States v. Howard, 569 F.2d 1331, 1336 (5th Cir.), cert. denied, 439 U.S. 834 (1978); United States v. Essex, 407 F.2d 214, 216-17 (6th Cir. 1969); United States v. Folakoff, 121 F.2d 333, 334 (2d Cir. 1941). The history of the statute as a contempt statute is discussed in Frankfurter & Landis, Power of Congress Over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Separation of Powers, 37 Harv. L. Rev. 1010 (1924); Goldfarb, The History of the Contempt Power, 1961 Wash. U. L.Q. 1; Nelles & King, Contempt by Publication in the United States (pts. 1 & 2), 28 Colum. L. Rev. 401, 525 (1928).


11 Id. (emphasis added).

12 Judiciary Act of 1789, ch. 20, 1 Stat. 73.

13 See Ex parte Terry, 128 U.S. 289, 302-04 (1888).

14 See Nelles & King, supra note 8 for a discussion of the reasoning behind providing the safeguards of trial for these types of contempt.


16 The changes in this clause have been minimal, particularly with regard to the last, omnibus clause. Compare § 1503 (containing the present omnibus clause) with Act of Mar. 2, 1831, ch. 103, § 2, 4 Stat. 487, 488 (containing the original omnibus clause). The original § 2 of the Act read:

That if any person or persons shall, corruptly, or by threats or force, endeavor to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the discharge of his duty, or shall, cor-
Thus, section 1503 is meant to prohibit contemptuous behavior\textsuperscript{17} which occurs outside of the court's presence. The existence of such a statute is justified by the fact that, in order to properly protect a court's power in handling judicial matters, there must exist provisions for punishing those who would interfere with those judicial matters, even if such interference occurs outside of the court's presence. Based on this history and the purpose of the statute, section 1503 should be seen as an attempt to prohibit all acts occurring outside of the presence of the court which are done with the intent to interfere with the administration of justice. The section under which a court may punish in-court contemptuous behavior\textsuperscript{18} is broadly written\textsuperscript{19} and has been applied to a wide variety of behaviors.\textsuperscript{20} As section 1503 was written to

\textsuperscript{17} "Contempt" has been defined as an "intentional act committed in defiance of the authority and dignity of the court." Comment, Application of the Law of Contempt to the Uphaus Case, 1961 COLUM. L. REV. 725, 727, quoted in, United States v. Panico, 308 F.2d 125, 128 (2d Cir. 1962), vacated, 375 U.S. 29 (1963). Thus, "[a]ny act which is calculated to embarrass, hinder or obstruct the court in the administration of justice or which is calculated to lessen its authority or dignity is a contempt." United States v. Ross, 243 F. Supp. 496, 499 (S.D.N.Y. 1965). Such definitions seem to place little emphasis on the type of behavior involved, but rather center on the purpose behind the behavior. For further discussion on this intent aspect, see notes 108, 110 infra.


\textsuperscript{19} A federal court has the power to punish the "misbehavior" of any person in its presence or "near thereto." Id. "Misbehavior" describes a wide spectrum of possible behaviors. The term as used in 18 U.S.C. § 401 (1976) has been defined as "conduct inappropriate to the particular role of the actor, be he judge, juror, party, witness, counsel or spectator." United States v. Seale, 461 F.2d 345, 366 (7th Cir. 1972). Any statute which prohibits any "inappropriate conduct" in or near the court's presence is a very broad statute. A challenge to 18 U.S.C. § 401 (1976) as being unconstitutionally vague was rejected in United States ex rel. Shell Oil Co. v. Barco Corp., 430 F.2d 998 (8th Cir. 1970).

\textsuperscript{20} The diverse behaviors for which persons have been prosecuted under 18 U.S.C. § 401 (1976) include the murder of a criminal defendant who had been granted an appeal to the United States Supreme Court, United States v. Shipp, 203 U.S. 563 (1906); making false statements on voir dire by jurors, Clark v. United States, 289 U.S. 1 (1932); the interference with cross-examination of a witness by questioning, prompting and conversing with the witness as to her testimony, United States v. Anonymous, 21 F. 761 (W.D. Tenn. 1884); making obscene statements in an opening statement, United States v. Bollenbach, 125 F.2d 458 (2d Cir. 1942); and the publication of newspaper articles which tend to ob-
achieve the same purpose, it should be given a similarly broad reading.

Many courts have recognized this and have broadly interpreted section 1503. While some have emphasized the historical development of the statute, 21 others have simply relied upon the broad purpose behind the statute. 22 Courts which have given section 1503 a broad reading have made statements such as: "[t]he statute is one of the most important laws ever adopted;" 23 "[t]he obstruction of justice statute is an outgrowth of Congressional recognition of the variety of corrupt methods by which the proper administration of justice may be impeded or thwarted, a variety limited only by the imagination of the criminally inclined;" 24 and that the statute covers "any effort or essay to do or accomplish the evil purpose that the section was enacted to prevent." 25

Not all courts, however, have given section 1503 such a broad reading. One factor which some courts have seen as justifying a narrow reading of the statute is the principle that, as a criminal statute, section 1503 must be strictly construed. 26 Further, the grammatical structure of the statute has led some courts to interpret it differently. Section 1503 has two almost separate clauses. The first portion is an enumeration of specific acts which are prohibited, while the second part is an omnibus, catch-all provision apparently aimed at covering any other act done with the specific intent of impeding the administration of justice. Such a structure has caused some courts to rely upon the statutory construction doctrine of ejusdem generis in construing section 1503.

21 See United States v. Griffin, 589 F.2d at 205; United States v. Howard, 569 F.2d at 1336; United States v. Polakoff, 121 F.2d at 334.
22 See, e.g., Catrino v. United States, 176 F.2d 884 (9th Cir. 1949); Broadbent v. United States, 149 F.2d 580 (10th Cir. 1945); Samples v. United States, 121 F.2d 263 (5th Cir.), cert. denied, 314 U.S. 662 (1941).
23 121 F.2d at 265.
24 Catrino v. United States, 176 F.2d at 887.
Under the rule of ejusdem generis, "[w]here general words follow specific words in an enumeration describing the legal subject, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." As applied to section 1503, the rule would limit what is prohibited by the omnibus clause to acts similar in nature to threatening or injuring persons involved in the judicial process. Courts have relied upon ejusdem generis to hold as not in violation of section 1503, an attempt to obtain a prisoner's release by threatening police, the destruction of documents sought by the Internal Revenue Service, an attempt to purchase a car which had been purchased with the proceeds of a bank robbery, simple perjury, conduct causing a parole violation and interfering with an FBI investigation.

Not all courts agree that ejusdem generis so limits section 1503. The rule, it is argued, is one of statutory construction to be used only when the intent of the statute is unclear. When the statute is intended to have a broad reaching effect, ejusdem generis should not be used to contravene that legislative purpose.

27 2A C. Sands, Sutherland Statutory Construction § 47.17 (4th ed. 1973). The rationale behind the rule of ejusdem generis is to reconcile the principles that: a) if possible, effect should be given to all words in a statute; b) the parts of any statute must be construed together; and c) it is presumed the legislature did not include superfluous language in a statute. Id. Ejusdem generis is said to accomplish "the purpose of giving effect to both the particular and the general words, by treating the particular words as indicating the class, and the general words as extending the provisions of the statute to everything embraced in that class, though not specifically named by the particular words." National Bank of Commerce v. Estate of Ripley, 61 S.W. 587, 588 (Mo. 1901).

28 A point not brought up in any of the cases applying ejusdem generis to § 1503 but which may provide support for its application is that § 1503 is entitled "(i)nfluencing or injuring officer, juror or witness generally." 18 U.S.C. § 1503 (Supp. IV 1980). There is no hint within this title that the omnibus clause is meant to apply to types of acts other than those specifically enumerated.

30 United States v. Ryan, 455 F.2d 728.
31 United States v. Metcalf, 435 F.2d 754 (9th Cir. 1970).
33 Halli v. United States, 260 F.2d 744.
35 United States v. Walasek, 527 F.2d at 679.
Interestingly, the grammatical structure which has led some courts to apply ejusdem generis is the very basis underlying the rationale of other courts which have given the omnibus clause of section 1503 a broad interpretation. The two portions of section 1503 have been seen as distinct from each other, with two types of prohibited behavior. The portion which enumerates the specific prohibited acts is aimed at protecting witnesses and other participants in judicial proceedings while the omnibus clause is meant to prevent miscarriages of justice. The argument is that, as opposed to applying the doctrine of ejusdem generis, the two provisions should stand apart and distinct from each other, with their own construction and application.

II. SECTION 1503 AND THE DESTRUCTION OF DOCUMENTS

A. The Sparse Background Before Faudman

State courts have had no trouble in finding the destruction or alteration of documents relevant to a judicial proceeding to be an obstruction of justice. In fact, most states have statutes which specifically make tampering with physical evidence a crime. Further, obstruction of justice has been held to be a common-law offense in most states. A Kentucky case, Commonwealth v.

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37 See, e.g., United States v. Nicosia, 638 F.2d 970, 974-75 (7th Cir. 1980); United States v. Partin, 552 F.2d 621, 631, (5th Cir.), cert. denied, 434 U.S. 903 (1977); Falk v. United States, 370 F.2d 472, 476 (9th Cir. 1966).

38 See Broadbent v. United States, 149 F.2d at 581; Samples v. United States, 121 F.2d at 265.

39 Such an argument is somewhat contrary to the general principle that statutes should be interpreted as a whole. See Pliakos v. Illinois Liquor Control Comm'n, 143 N.E.2d 47, 49 (Ill. 1957). The argument is not made to preclude the statute from being interpreted as a whole, but rather to limit the application of ejusdem generis to the omnibus clause of § 1503. Of course, it is partially because of conflicts between principles such as these that the doctrine of ejusdem generis exists. See note 27 supra for a discussion of the rationale underlying the rule.

40 See note 5 supra for an explanation as to why there is no distinction made between the alteration of documents and the destruction of documents.


Southern Express Co., has been read as supporting the contention that the suppression of corporate records, knowing that they will be requested by a grand jury, constitutes the common-law offense of obstruction of justice. Although the court does not specifically say that the case was decided under the common law, no statute is cited in the opinion. In addition, the Kentucky obstruction of justice statute relating to tampering with physical evidence was not enacted until 1974, well after the opinion in Southern Express. Thus, Southern Express is properly interpreted as authority for the proposition that the suppression of corporate records constituted obstruction of justice at common law.

Such authority is of little help to federal courts, however, for there are no common-law offenses against the United States. Thus, to be a federal crime, there must be a federal statute making the behavior in question a crime. Unlike many state laws, however, there is no federal statute which specifically makes the destruction of physical evidence sought by a grand jury or other investigating body a crime. Instead, the broad, omnibus portion of section 1503 has been used to punish those who destroy documents which have been, or which will be, subpoenaed by a grand jury.

One of the earliest federal cases which dealt with section 1503 as applied to acts relating to documents which had been subpoenaed by a grand jury is Bosselman v. United States. Bosselman was the president and treasurer of a corporation who,

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43 169 S.W. 517 (Ky. 1914). This original decision by the Court of Appeals of Kentucky involved the reversal of a granted demurrer. Id. After a trial on the merits, a conviction of the Southern Express Company for obstructing justice was reversed due to insufficient evidence. Southern Express Co. v. Commonwealth, 180 S.W. 839 (Ky. 1915).

44 See United States v. Solow, 138 F. Supp. at 815; State v. Cassatly, 225 A.2d 141, 145 (N.J. Super. 1966). As opposed to the alteration or destruction of documents sought by a grand jury, Southern Express specifically dealt with the removal of corporate records and papers from the state knowing they would be sought by a grand jury. 169 S.W. at 517-18.

45 KY. REV. STAT. § 524.100 (Bobbs-Merrill 1975) [hereinafter cited as KRS].


49 239 F. 82 (2d Cir. 1917).
upon learning that company records were material to a grand jury investigation of him personally, ordered employees to alter the books and records of the company. The Second Circuit Court of Appeals affirmed a conviction under section 1503 with no discussion of whether such acts were properly within the scope of the statute. A reading of the opinion, however, makes it clear that the conviction was based on the omnibus clause of section 1503 since a key issue in the case was whether Bosselman’s acts were done “corruptly.”

The first general discussion of whether destruction of documents sought by a grand jury was a violation of section 1503 was by the District Court for the Southern District of New York in United States v. Solow. The defendant in Solow destroyed four letters located in business files knowing that they would be sought by a grand jury. In affirming a conviction under the latter provision of section 1503, the court relied heavily on the common-law position of Southern Express. Although the court provided this discussion, the issue in Solow was not whether such behavior was prohibited by section 1503. The issue was instead based on Solow’s contention that, as a subpoena had not yet been served, justice was not yet being “administered” and thus there could be no obstruction of the “due administration of justice.” The court rejected this argument.

Other federal courts have engaged in similar discussions without directly facing the contention that the destruction of documents sought by a grand jury is not within the proper scope

50 Id. at 86.
52 Id. at 814. Although he knew the grand jury was interested in the letters, Solow had not yet been served with a subpoena duces tecum. Id.
53 Id. at 815.
54 Such an argument relates to the general question of when the administration of justice does in fact begin, briefly discussed in note 8 supra.
55 The court did so by drawing an analogy to the fact that an attempt to influence a witness may violate § 1503 even though the witness had not been served with a subpoena. The same argument was rejected in United States v. Walasek, 527 F.2d at 678, and United States v. Fineman, 434 F. Supp. 197, 202 (E.D. Pa. 1977), aff’d, 571 F.2d 572 (3d Cir.) cert. denied, 436 U.S. 945 (1978). Of course, knowledge that the documents are relevant to a pending grand jury investigation is a minimum requirement, for without such knowledge it would be impossible for a person to have the requisite intent to violate § 1503. See note 110 infra and the accompanying text for a discussion of the requisite intent.
of section 1503. Most significant is a line of cases from the Second Circuit which seems to be based on the assumption that destroying such documents violates section 1503. Yet, outside the Ninth Circuit, where the court's opinions were somewhat unclear, the first reported federal case to deal directly with the issue did not appear until 1975. In United States v. Walasek, the Third Circuit Court of Appeals was faced with the contention that the doctrine of ejusdem generis limited the acts prohibited by the omnibus clause of section 1503 to acts similar in nature to those enumerated in the earlier portion of the statute. The destruction of documents, the argument went, was not similar in nature to the enumerated acts. Although the court recognized that other courts had applied ejusdem generis to section 1503, the Third Circuit refused to do so and held the conviction under the omnibus clause of the statute for the destruction of corporate records which were sought by a grand jury to be proper.

There was a line of cases in the Ninth Circuit, however, which seemed to be contrary to this developing recognition of the application of section 1503 to persons destroying subpoenaed documents. Although it had been the Ninth Circuit which had provided a statement which many courts cite for support in broadly interpreting section 1503, this same court began to give

58 See United States v. Walasek, 527 F.2d 676.
59 527 F.2d at 676.
60 Before Walasek the Third Circuit Court of Appeals had not spoken as to the applicability of the doctrine of ejusdem generis to § 1503.
61 527 F.2d at 681. Since Walasek, the Third Circuit has affirmed another conviction under § 1503 for the destruction of documents in United States v. Simmons, 591 F.2d 206.
62 See Catrino v. United States, 176 F.2d at 887. The quote from Catrino appears in the text accompanying note 24 supra.
a very narrow reading to the statute’s omnibus clause. In *Haili v. United States* and *United States v. Metcalf*, the court applied the doctrine of ejusdem generis to section 1503 and reversed convictions under the statute. In *Metcalf*, the court went so far as to say that “the manner in which the statute may be violated would ordinarily seem to be limited to intimidating actions.”

Then, in *United States v. Ryan*, it was held that the giving of false documents to the Internal Revenue Service during an IRS investigation did not violate section 1503. Although the opinion in *Ryan* was not very clear, *Ryan* was read by other courts as holding that section 1503 could not be used to prosecute persons who destroy documents sought by a grand jury or other investigatory body.

**B. Faudman and the Resolution of the Ninth Circuit’s Position**

In *United States v. Faudman*, the Sixth Circuit Court of Appeals was faced with the contention that a prosecution for the destruction of corporate records with knowledge that the records were sought by a grand jury could not be based on section 1503. Along with the relevant cases from other jurisdictions, the court had to contend with one of its own decisions. In *United States v. Essex*, the Sixth Circuit had applied ejusdem generis to section 1503 and held that the submission of a false affidavit to a grand jury did not violate the statute. Thus, with *Faudman*, the Sixth Circuit faced a background similar to that faced by the Ninth Circuit when it decided *Ryan*.

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63 260 F.2d 744 (9th Cir. 1958).
64 435 F.2d at 754.
65 Id. at 757.
66 455 F.2d at 728.
67 See *United States v. Walasek*, 527 F.2d at 679-80. See also *United States v. Faudman*, 640 F.2d at 22.
68 640 F.2d at 22.
69 See notes 49-67 *supra* and the accompanying text for a discussion of these precedents from other jurisdictions.
70 407 F.2d 214 (6th Cir. 1969).
71 The approaches taken in these two circuits seemed very similar. The *Essex* court cited *Haili* in deciding that ejusdem generis must be applied to § 1503. *Essex* and *Haili*,
The court in *Faudman*, however, held the destruction of documents therein involved to be a violation of section 1503. An important consideration in the court's opinion was that the methods of obstructing justice enumerated in the statute are stated in the disjunctive.\(^72\) *Essex* was distinguished based on the fact that in *Essex*, there was no interference with a witness.\(^73\) Such a distinction was based on the court's view that the destruction of corporate records amounts to the impeding of a witness, that witness being the corporation.\(^74\) According to the court, even if *ejusdem generis* was applied to limit the omnibus clause of section 1503, the destruction of documents would be prohibited, as it would be similar to impeding other witnesses.\(^75\) Without citing to the general principle that a legislature will not be presumed to enact useless statutes,\(^76\) the court did state that "[u]nless some-

\(^{72}\) *Id.*

\(^{73}\) *Id.*

\(^{74}\) *Id.* Impeding or influencing the testimony of a witness is clearly a violation of § 1503. See United States v. Fayer, 523 F.2d 661 (2d Cir. 1975); Roberts v. United States, 239 F.2d 467 (9th Cir. 1956). Viewing the company as a separate entity and thus a separate witness, *Faudman* can be seen as having impeded the testimony of another witness. Although the person who destroys corporate documents is usually an officer of the company, the approach that the individual officer and the corporation are separate entities is consistent with basic corporation law. See H. Henn, LAW OF CORPORATIONS § 80 (2d ed. 1970) (viewing a corporation as a "person").

\(^{75}\) *Id.*

\(^{76}\) See Imperial Prod. Corp. v. Sweetwater, 210 F.2d 917, 920 (5th Cir. 1954).
thing more than the precise acts listed in the earlier language was intended for inclusion, the 'omnibus' language of § 1503 would be a surplusage."

After Faudman, the Ninth Circuit of Appeals cleared up much of the confusion it had created in this area in United States v. Rasheed. In holding the concealment of church documents after the church had received a grand jury subpoena duces tecum to be a violation of section 1503, the court followed the decisions in Walasek and Faudman. The court explained its prior decision in Ryan as being based on its opinion that subpoenaed documents therein were immaterial to the grand jury proceedings. The court went on to reason that the narrow reading given section 1503 in Metcalf did not compel the conclusion that the statute did not encompass the concealment of documents, since the statement was purely dicta; the issue was whether a judicial proceeding was involved. Further, the behavior in Metcalf was quite different from the acts in Rasheed, and the concealment of documents was similar in nature to the enumerated acts. Thus, with Rasheed, the Ninth Circuit Court of Appeals, which had created much confusion in the area, made it clear that it was in accord with other courts which had faced the same issue: the destruction, alteration or concealment of documents sought by a grand jury is punishable under the omnibus concluding phrase of section 1503.

C. Why Faudman and Rasheed are Correct

There can be no doubt that judicial proceedings can be frustrated in a multitude of ways, the number being limited only by

77 640 F.2d at 23.
78 663 F.2d 843 (9th Cir. 1981).
79 527 F.2d 676.
80 640 F.2d 20.
81 663 F.2d at 851.
82 Id. at 851-52.
83 See id. at 852.
84 Other courts have discussed whether such destruction of documents would violate § 1503 in dicta. See United States v. Griffin, 589 F.2d at 203; United States v. Howard, 569 F.2d 1334; United States v. Knife, 371 F. Supp. at 1346.
the collective imagination of persons involved in those judicial proceedings. Section 1503 is an attempt to prohibit all acts committed with the intent to obstruct the administration of justice. The alteration or destruction of documents by one who has knowledge that they are sought by a grand jury is a flagrant attempt to impede the administration of justice. Clearly any statute which purports to prohibit any attempt to obstruct the due administration of justice must be interpreted so as to allow the statute to achieve that policing purpose.

The doctrine of ejusdem generis should not stand in the way of the proper interpretation of section 1503. As the statute is an attempt to prohibit acts committed with a specific intent, the statute should not be read as limited to types of acts similar in nature to those specifically enumerated, but rather to acts committed with a similar intent to those spelled out in the first portion of section 1503. Although the first portion of the statute does not speak of intent, it is easy from the acts therein enumerated, to impute upon any person who commits the acts specifically prohibited, the intent to interfere with the administration of justice. A construction of the statute which would limit section 1503's application to types of acts similar to those spelled out would preclude its application to many acts which have a potentially devastating effect upon the administration of justice.

Three federal courts of appeals have held the omnibus clause of section 1503 to prohibit the destruction or alteration of corporate records, including the Ninth Circuit which had strongly im-

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85 See Catrino v. United States, 176 F.2d at 887.
86 Cf. United States v. Powell, 423 U.S. 87 (1975) (Court refused to apply ejusdem generis to 18 U.S.C. § 1715 (1976) where legislative intent was clear); United States v. Alpers, 338 U.S. 680 (1950) (Court refused to apply ejusdem generis to 18 U.S.C. 1462 (1976) where statute's purpose was clear); Gooch v. United States, 297 U.S. 124 (1936) (Court refused to apply ejusdem generis to Federal Kidnapping Act where there was no uncertainty as to the intended meaning of the words used).
87 As pointed out in United States v. Walasek, 527 F.2d at 679 n.9, an interpretation which would limit the application of the omnibus clause of § 1503 to similar types would preclude a prosecution for bribing a juror, for bribery involves neither threatening nor injurious behavior. Yet, it is well-settled that bribing participants in a judicial proceeding does violate § 1503. See, e.g., United States v. Hoffa, 349 F.2d 20, 40 (6th Cir. 1965), aff'd, 385 U.S. 293 (1966).
plied that the statute did not cover such behavior. There are strong indications from two other circuits that those courts of appeals would not hesitate in reaching a similar conclusion. There actually is no indication that any court would decide differently. In consideration of the broad purpose behind section 1503, and the culpable intent of persons involved in these cases; the application of section 1503 to convict those who would destroy documents knowing they are sought by a grand jury is proper.

III. DOES THE BROAD READING OF SECTION 1503 RENDER IT UNCONSTITUTIONALLY VAGUE?

Since it is now clear that courts will use the omnibus clause of section 1503 to punish those who destroy documents knowing they will be sought by a grand jury, the remaining question is whether such an interpretation of the statute renders it unconstitutionally vague. A defendant wishing to challenge section 1503 on grounds of vagueness in this context would be limited in the number of valid arguments that could be made. As no first amendment considerations are involved, the defendant making the challenge would not be allowed to argue that section 1503 is unconstitutionally vague on its face. Instead, the inquiry would be limited to whether, as applied to a person who would destroy documents knowing they are sought by a grand jury, section 1503 “fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.”

88 See United States v. Rasheed, 663 F.2d 843 (9th Cir. 1981); United States v. Faudman, 640 F.2d 20 (6th Cir. 1980); United States v. Walasek, 527 F.2d 676 (3d Cir. 1975).
89 The Second Circuit Court of Appeals with its decisions in United States v. Weiss, 491 F.2d 460; United States v. Cohn, 452 F.2d 881; and United States v. Curcio, 279 F.2d 681; and the Fifth Circuit Court of Appeals with its decisions in United States v. Griffin, 589 F.2d 200; and United States v. Howard, 569 F.2d 1331 both appear ready to reach similar conclusions as those reached by the courts of appeals in the Third, Sixth, and Ninth Circuits.
90 See United States v. Powell, 423 U.S. 87; United States v. Mazurie, 419 U.S. 544, 550 (1975). The Fifth Circuit recognized this fact as applied to challenges to § 1503. See United States v. Howard, 569 F.2d at 1336 n.9. However, the court went on to reason that even if such a challenge could be made, the statute was not vague on its face. Id. In so doing, the court said that “[i]f anyone unwittingly runs afoul of § 1503, it will not be on account of a misconstruction but because of an ignorance for which there is no excuse.” Id.
Since the inquiry would be limited to the specific facts involved, precedent involving other statutes and other acts would possibly be of little value. Further, the United States Supreme Court precedents in this area are somewhat difficult to reconcile. For example, a statute which prohibits the making of "any unjust or unreasonable rate or charge" is unconstitutionally vague, while a statute which makes it a crime to sell goods at "unreasonably low prices for the purpose of destroying competition" is constitutionally valid. What does emerge from the precedents of the Supreme Court, though, are the standards by which to judge whether a statute is unconstitutionally vague as applied to a specific set of facts. The statute must give fair notice of what is prohibited. The law must be sufficiently clear so that, upon reading the statute, a person of ordinary intelligence would understand that a contemplated act is prohibited. Due to the variety of factual situations most statutes must deal with, "no more than a reasonable degree of certainty" that the act is prohibited is required.

Although none of the courts which have held the destruction of documents to be a violation of section 1503 have addressed the question of the statute's constitutionality as applied to those facts, a few courts have discussed the constitutionality of section 1503 as applied in other situations. Arguments which have been summarily rejected include the argument that the use of the term "corruptly" makes the statute unconstitutionally vague and that the statute is too vague to be applied to preventing a witness from testifying before a grand jury. In Anderson v. United States,
the Sixth Circuit Court of Appeals upheld the constitutionality of section 1503 as applied to the alteration of testimonial evidence. Although the opinion is somewhat confusing,\textsuperscript{102} the court placed a great deal of emphasis on the broad objective of the statute.\textsuperscript{103} The court had no trouble in finding that the statute gave adequate forewarning: "[T]here would seem to be no room for conflict among reasonable minds as to whether actions such as were charged against appellants would constitute an endeavor to impede the due administration of justice."\textsuperscript{104}

The Fifth Circuit Court of Appeals has addressed the constitutionality of section 1503 in two recent, well-written decisions.\textsuperscript{105} In holding that the omnibus clause of section 1503 gave adequate notice that the acts therein involved\textsuperscript{106} would violate the statute, the court noted that the omnibus clause clearly prohibits all obstructions of justice.\textsuperscript{107} Thus, according to this rationale of the court, a defendant would have adequate notice that any attempt to obstruct justice would be prohibited, regardless of the form of the obstruction.\textsuperscript{108}

The holding that the omnibus clause of section 1503 gives fair notice of the acts which it prohibits is questionable.\textsuperscript{109} A reading of the statute is likely to leave one wondering whether the destruction of subpoenaed documents is prohibited by the omnibus

\textsuperscript{102} The court starts out discussing the constitutionality of the statute, then jumps to a discussion of the sufficiency of the indictment and then concludes by discussing, once again, the constitutionality issue. Anderson v. United States, 215 F.2d at 87-90.

\textsuperscript{103} Id. at 88.

\textsuperscript{104} Id.

\textsuperscript{105} United States v. Griffin, 589 F.2d at 206-07; United States v. Howard, 569 F.2d at 1336-37.

\textsuperscript{106} Griffin involved an attempt to sell transcripts of secret grand jury proceedings to persons under investigation while Howard involved perjury by a witness before a grand jury.

\textsuperscript{107} United States v. Griffin, 589 F.2d at 206; United States v. Howard, 569 F.2d at 1336-37.

\textsuperscript{108} This approach amounts to saying that the essential elements of a violation of the omnibus clause of § 1503 are: a) the intent to obstruct justice; and b) any act to carry out that intent. Such an approach would prohibit a wide range of behaviors, and is consistent with the statute's history as a contempt statute. See note 17 supra for a discussion of the emphasis on intent as to what is "contempt."

\textsuperscript{109} The Fifth Circuit recognized this fact in United States v. Griffin, 589 F.2d at 207.
clause. However, no one could possibly believe that, upon learning that certain documents are sought by a grand jury, it is not improper to destroy those documents. Clearly, one who destroys documents knowing that they are sought by a grand jury has the intent of frustrating the grand jury proceedings.

Section 1503 includes this culpable intent as a necessary element of the offense. Any person who has such a culpable intent needs no further notice that what is contemplated is wrong. The constitutional requirement of giving fair notice "cannot be used as a shield by one who is already bent on serious wrongdoing."

Although section 1503 may be lacking in giving complete, unequivocal notice that it prohibits the destruction of documents, no such unequivocal notice is required; one set on committing an act which by its very nature is unlawful should not be protected from prosecution by claiming that he did not have adequate notice that such acts were wrong.

CONCLUSION

When persons learn that a grand jury is investigating them or a corporation of which they are an officer, they may well first consider what steps, legal or illegal, can be taken to avoid criminal prosecution. Hopefully, in most situations only legitimate action is taken. However, there are persons who do in fact proceed with improper action in order to avoid prosecution.

One of the surest ways to frustrate a grand jury’s investiga-

110 Section 1503 includes this element of culpable intent by requiring that, for an act to be a violation of § 1503, it must be done "corruptly." "Corruptly" as used in this statute has been defined broadly to include any endeavor to influence a witness or to impede or obstruct justice. See Bosselman v. United States, 239 F.2d at 86; Broadbent v. United States, 149 F.2d at 581; United States v. Cohen, 202 F. Supp. at 588. This culpable intent is not only an element of the offense, it is practically the whole offense. The statute is broad enough so that any act committed to carry out that culpable intent, whether or not the attempt is successful, will be a violation of § 1503.

tion is to destroy or alter physical evidence which is relevant to the body's deliberations. It was precisely such an act, committed with that precise intent, that faced the Sixth Circuit Court of Appeals in Faudman. For destroying corporate records with knowledge that a federal grand jury was seeking those records, Arnold Faudman was prosecuted for obstructing justice as prohibited by 18 U.S.C. section 1503. Due to the broad language of the statute which makes no specific mention of destroying physical evidence, the argument was made that the statute did not cover the specific acts committed by Faudman.

Such a contention was not and cannot be accepted. Section 1503 began as a contempt statute, the purpose of which is to prohibit any attempt to obstruct the due administration of justice. The destruction of corporate records knowing that they are sought by a federal grand jury is the exact type of behavior the statute was designed to prohibit. Thus, Faudman, along with Walasek and Rasheed, are correct in holding the destruction or alteration of corporate documents, done with the knowledge that they are relevant to a grand jury proceeding, is a violation of section 1503.

Furthermore, since defendants have adequate notice under section 1503 that any attempt to obstruct justice is prohibited, courts should disallow future arguments that the statute is unconstitutionally vague as applied to cases involving the destruction of documents.

Michael D. Risley